Supreme Court, U.S.
FILED

98 279 AUG 12 1998

OFFICE OF THE CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1998

DIANE YOUNG, WILLIAM HURSKIN,
AND CHARLES ANDERSON,
Petitioners,
VS.
LOCKHEED ADVANCED DEVELOPMENT COMPANY,
a division of Lockheed Corporation;
AND LOCKHEED CORPORATION,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

LAW OFFICES OF GARY S. LEWIS
GARY S. LEWIS
5000 North Parkway Calabasas
Suite 220
Calabasas, California 91302
(818) 222-2391
Attorney for Petitioners

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

39 pp

QUESTIONS PRESENTED

1. Whether, for purposes of summary judgment, an employee who has established an inference of disparate treatment through direct or circumstantial evidence of discriminatory intent, will necessarily have raised a genuine issue of material fact with respect to the legitimacy of the employer's articulated reason for its employment decision.

2. Whether the court of appeals erred in holding that an employee cannot base a claim of breach of contract or breach of the implied covenant of good faith and fair dealing on an employer's longstanding written human resources policies if the employer reserves the right to modify the policies as it deems necessary or appropriate.

3. Whether the court of appeals erred in holding that statements by a party that are "self-serving" are insufficient to raise an issue of fact to defeat a motion for summary judgment.

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties to the proceedings.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
I. AN EMPLOYEE WHO HAS ESTABLISHED A *PRIMA FACIE* CASE OF EMPLOYMENT DISCRIMINATION BY MEANS OF ACTUAL EVIDENCE OF RACIAL ANIMUS BY THE DECISION-MAKER HAS NECESSARILY CREATED AN ISSUE OF FACT AS TO WHETHER THE EMPLOYER'S PROFFERED REASONS FOR ITS CONDUCT ARE PRETEXTUAL	7
II. THE APPELLATE COURT CONTRAVENED ESTABLISHED CALIFORNIA LAW REGARDING CONTRACTS	13
III. THE COURT OF APPEALS ERRED IN REJECTING EVIDENCE ON THE GROUNDS THAT IT WAS UNCORROBORATED AND SELF-SERVING	14
CONCLUSION	15

Page

APPENDIX A

OPINION, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED APRIL 8, 1998 ..... 1a

APPENDIX B

EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS BEFORE THE DISTRICT COURT ON SEPTEMBER 9, 1996 ..... 1b

APPENDIX C

ORDER OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING *EN BANC,* FILED MAY 14, 1998 ..... 1c

TABLE OF AUTHORITIES

Cases

	Page
Denney v. Universal City Studios, Inc. 10 Cal.App.4th 1226, 13 Cal.Rptr.2d 170 (1992)	14
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)	8
Johnson v. Washington Metropolitan Transit Authority, 883 F.2d 125, (D.C. Cir. 1989)	14, 15
Lowe v. City of Monrovia, 775 F.2d 998 (9th Cir. 1985)	8, 11
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	5, 7, 8, 11
Miller v. Fairchild Industries, Inc., 797 F.2d 727 (9th Cir. 1986)	13
Okun v. Morton, 203 Cal.App.3d 805, 250 Cal.Rptr. 220 (1988)	13
Perdue v. Crocker National Bank, 38 Cal.3d 913, 216 Cal.Rptr. 345 (1985)	13, 14
Powell v. Central California Federal Savings & Loan Association, 59 Cal.App.3d 540, 130 Cal.Rptr. 640	13, 14
Pullman-Standard v. Swint, 456 U.S. 273	10
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	7, 10, 11
United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983)	10

Statutes

28 U.S.C. § 1254(1)	1
29 U.S.C. § 185	3
California Government Code § 12940(a)	1, 3
California Government Code § 12960	14

OPINIONS BELOW

There was no formal opinion of the district court. Excerpts of the transcript in that court, including the judge's statement in granting the motion for summary judgment, are reproduced in Appendix B to this petition.

The opinion of the court of appeals was not officially reported. It is reproduced in Appendix A to this petition.

JURISDICTION

The opinion of the court of appeals was entered on April 8, 1998. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on May 14, 1998. (Appendix C.) The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

California Government Code § 12940(a).

> It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:
>
> (a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions or privileges of employment.

STATEMENT OF THE CASE

This case involves employment discrimination suffered by petitioners of such a pervasive nature that the district court was compelled to comment that: "Is that an unacceptable work environment, of course it is, if true; any fool knows that. . . ." (Appendix A.) Unacceptable as the environment was, petitioners were nonetheless denied redress because of erroneous constructions by the district court and the appellate court of this Court's cases setting forth the tests for ruling on summary judgment motions in employment discrimination cases.

Petitioners are African American. They were all long term employees in the plant protection department of the security branch at Lockheed Corporation ("Lockheed"). Many of the jobs in said department required that the employee have not only a Department of Defense clearance but also a special "access" to a particular program, such as to the F-117A program or the U-2 program. More accesses mean more overtime opportunities and greater job security since the employee can be posted to a far greater number of locations.

For more than a decade each of the petitioners held a number of such accesses. Suddenly, in 1992 two of the petitioners had all of their accesses revoked without explanation. In 1993 the third petitioner was improperly terminated for a purported attendance problem, which termination was reversed after she filed a union grievance. Upon reinstatement, this petitioner was only reaccessed to one of the four programs to which she had previously been accessed.

After their accesses were revoked, each of the petitioners sought to have them restored. For literally years petitioners applied and submitted the necessary paperwork for accesses, only to be told repeatedly by Lockheed that their paperwork

had been "lost," which required new submissions, that there were changed requirements requiring additional documents that were not required of other employees or when they had obtained accesses in the past, or that new signatures were allegedly needed despite proof that only one submission and signature was ever needed. These excuses were consistent with uncontradicted evidence that such methods were traditionally used by management to delay or block employees' attempts to gain access.

As a result of petitioners' continuing inability to obtain accesses, on March 3, 1995 they filed suit in state court in California. Petitioners alleged that the termination of their accesses and their continuing inability to obtain new accesses was the result of racial discrimination in violation of the California Fair Employment and Housing Act ("FEHA"), California Government Code § 12940(a). Petitioners also alleged that Lockheed's arbitrary, capricious and discriminatory conduct constituted a breach of the policies and procedures promulgated by Lockheed regarding the terms of employment and a breach of the implied covenant of good faith and fair dealing.

Lockheed removed the action to federal court on the ground that the causes of action for breach of contract and breach of the implied covenant of good faith involved a federal question, namely, whether said causes were preempted by the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. Thereafter, Lockheed moved for summary judgment.

Lockheed's motion for summary judgment was made on the grounds that petitioners lost their accesses for nondiscriminatory reasons, that the claims of two of the petitioners were barred by the statute of limitations and that the contract-related claims were barred because petitioners' employment was covered by a collective bargaining agreement. To support its claim of nondiscrimination, Lockheed

contended that it was the government that made the ultimate decision as to whether an employee was accessed to a particular program. Substantial evidence existed, however, that Lockheed, too, had the power to prevent the government from acting on petitioners' applications by merely disapproving the application or exercising other means of stopping the applications from even getting to the government. Lockheed produced no evidence that all of the access applications submitted by petitioners had been forwarded to or denied by the government.

The district court granted Lockheed's motion. Petitioners' evidence, including their own declarations and declarations, or deposition testimony, from 18 other current or former employees of Lockheed, consisted of direct and circumstantial evidence of pervasive, blatant and egregious racial animosity[1] and manipulation of the access process by the decisionmakers at Lockheed in charge of petitioners' access requests. Although the district court expressed disgust with Lockheed's conduct, the court nonetheless granted the motion, ruling that petitioners had not established a *prima facie* case of discrimination since petitioners failed to produce evidence that non-minorities were treated differently.[2]

---

[1]The extent and vileness of the racial animus was so great that the district court was moved to state that:

> [I]f Lockheed, with knowledge of this, is letting this kind of thing go on, they ought to be embarrassed, and some people's heads ought to roll.
>
> I'm not saying that is the truth of it, I'm just saying if those averments were proven, people that live in this town — and I swear I think people who live in this century — have no business tolerating that, doing it or tolerating it. (Appendix B.)

Although granting summary judgment, the district court suggested that Lockheed should apologize to petitioners and voluntarily give them money.

[2]The district court did not address the statute of limitations' argument or the contract-based causes of action during the course of its ruling.

The court of appeals held that there was no such requirement, and determined that petitioners Diane Young and William Hurskin had set forth a *prima facie* case of discrimination.

> Young and Hurskin offered evidence that they are members of a protected class, that they were accessed to a number of programs for over ten years, that their accesses were revoked, that there were substantial delays in Lockheed's processing of their applications for accesses, that managers at Lockheed had interfered in the past with the processing of access applications, and that managers who had the ability to interfere with accessing procedures had expressed or condoned racial bias and racially biased practices at Lockheed. *These facts in combination are sufficient to raise an inference that plaintiffs' difficulties with their security accesses were the result of discrimination.* (Appendix A.) (Emphasis added.)

Although determining that petitioners Young and Hurskin had set forth a prima facie case of unlawful discrimination through direct and circumstantial evidence of discrimination, rather than through the presumption set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) erroneously applied by the district court, the appellate court nonetheless held that petitioners had not produced sufficient evidence to establish that Lockheed's purported justifications were pretextual. Thus, the appellate court accepted Lockheed's explanation that said petitioners' difficulties in being reaccessed to the programs could have been the result of adverse information in their background or, regarding Hurskin, the result of Hurskin's failure to complete all of the paperwork for one program. According to the appellate court, petitioners offered only "general and con-

clusory" evidence of racism and Lockheed's ability to delay or deny accesses.[3]

Regarding the causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing, the appellate court ruled that such claims could not be based on Lockheed's Human Resources Directives because Lockheed's reservation of the right to modify or alter them at its discretion made their binding force "minimal."

As for petitioner Anderson, the appellate court ruled that Anderson's uncorroborated declaration that he timely filed an administrative claim with the California Department of Fair Employment and Housing ("DFEH"), a prerequisite to filing a civil action under the FEHA, was insufficient as a matter of law to counter a declaration from the DFEH that it had no record of such a filing.

REASONS FOR GRANTING THE WRIT

In this case the Ninth Circuit has erected new and serious impediments to workers seeking redress for unlawful discrimination. Although petitioners established a *prima facie* case by direct and circumstantial evidence of a discriminatory motive by their management in regard to the conduct under scrutiny, the appellate court refused to hold that such evidence necessarily created an issue of fact as to whether Lockheed's purported justification for its conduct was pretextual.

---

[3]This was stated despite petitioners' presentation of eyewitness testimony from another plant protection officer that Lockheed's chief of plant protection, who had the power to disapprove petitioners' applications, called black persons "niggers" and "black motherfuckers" while at work, and despite the declaration from a Lockheed access processor that her boss would tell her to shelve applications and lie to employees about why they had not been accessed.

Also, the appellate court nullified established law in California by holding, sua sponte, without reference to any authority, that an employee cannot proceed against an employer on claims for breach of contract or breach of the implied covenant of good faith and fair dealing based on longstanding written human resources policies promulgated by the employer where the employer reserves the right to modify the policies.

Finally, the appellate court created, again on its own without the issue being raised by respondents, a new ground for disregarding evidence when considering a motion for summary judgment. According to the court of appeal, opposing evidence that is "self-serving" and uncorroborated cannot create an issue of fact. The conclusion is unprecedented and without logical support, and it undermines the policy favoring employees proceeding in discrimination cases where the elusive element of intent is in issue.

I.

AN EMPLOYEE WHO HAS ESTABLISHED A *PRIMA FACIE* CASE OF EMPLOYMENT DISCRIMINATION BY MEANS OF ACTUAL EVIDENCE OF RACIAL ANIMUS BY THE DECISIONMAKER HAS NECESSARILY CREATED AN ISSUE OF FACT AS TO WHETHER THE EMPLOYER'S PROFFERED REASONS FOR ITS CONDUCT ARE PRETEXTUAL.

In order to prevail on summary judgment in a disparate treatment discrimination case, an employee must demonstrate that the employer had a discriminatory intent or motive in carrying out the employment decision. Thus, in a race discrimination case the employee must be able to raise an inference that the decisionmaker's conduct was contributed to by racial discrimination. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *McDonnell*

Douglas, supra. Typically this is done by a three-step process whereby the employee establishes a prima facie case of discrimination, which can be established even in the absence of any direct or circumstantial evidence of a discriminatory intent, with the burden of production then shifting to the employer to articulate a legitimate, nondiscriminatory reason for its conduct. *Burdine* at 253-254. If the employer does so, then the plaintiff must demonstrate that the reason was pretextual. *Id.* at 256.

In the usual circumstances, an employee establishes a *prima facie* case by satisfying the four-part test of *McDonnell Douglas,* thereby relying on a presumption of discrimination. However, the employee can establish an inference of discriminatory motive by actual evidence, either direct or circumstantial. *McDonnell Douglas,* 411 U.S. at 802, n. 13; *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 358 (1977); *Lowe v. City of Monrovia,* 775 F.2d 998, 1009 (9th Cir. 1985).

Here, the court of appeals correctly concluded that petitioners had set forth a *prima facie* case of discrimination by means of actual evidence of discriminatory intent. The evidence demonstrated that management in petitioners' branch, including those decisionmakers in control of the access process with whom petitioners had to contend, routinely referred to blacks as "niggers" and "black motherfuckers," told "nigger" jokes, condoned or accepted such conduct in subordinates (i.e., petitioners' coworkers) and clustered blacks in lower echelon jobs. The court of appeals also agreed that the evidence showed that these same management personnel would pull accesses previously given to employees and/or prevent employees from obtaining accesses at management's sole discretion, routinely lying all the while about the reasons the employee was not accessed. The ways in which this deception and manipulation was practiced mirrored the manner in which petitioners

were treated regarding their attempts to regain their accesses.

Despite petitioners' establishment of a *prima facie* case of discrimination by direct and circumstantial evidence, the appellate court considered Lockheed's purported reasons and then determined that petitioners had not presented "any evidence" that Lockheed's reasons were pretextual and that the evidence did not create a "genuine" issue of fact regarding the reasons for their not being accessed.[4] In so ruling, the appellate court disregarded the very evidence that established that the decisionmakers had the ability and discriminatory motive to engage in unlawful discrimination, and instead, in effect, required that petitioners produce additional evidence to establish discriminatory intent.

The court of appeals erred. This Court has held that evidence that establishes a *prima facie* case is to be considered in determining whether the employer's proffered reason for its conduct is pretextual, and that the ultimate purpose of such evidence is to determine if a discriminatory intent

---

[4]With respect to Young, the court accepted Lockheed's position that the presence of adverse information in her background might have explained her failure to be reaccessed to two programs, dismissing out of hand Young's evidence that Lockheed had the means and the opportunity to delay and deny accesses without even submitting the paperwork to the government. Similarly, the appellate court stated that Hurskin's evidence "regarding Lockheed managers' ability to interfere with the accessing process and evidence of racism in Lockheed's management ranks" was somehow insufficient to create an issue of fact regarding the processing of his accesses given the presence of adverse information in his background. In fact, petitioners had specific, first-hand declarations or testimony detailing Lockheed's custom of wrongfully preventing access requests from even being submitted to the government as to certain employees. Although not material to petitioners' position herein, petitioners disagree that no evidence was presented or that a genuine issue of fact was not created by such evidence *even if petitioners had not produced evidence of actual bias.*

exists. See, e.g., *Burdine,* 450 U.S. at 253, 255, n. 10. The appellate court manifestly erred in granting summary judgment when petitioners' evidence had established that there was "an inference that plaintiffs' difficulties with their security accesses were the result of discrimination." (Appendix A.) Having established this, petitioners created an issue of fact as to whether Lockheed discriminated against them which could only be decided by a trier of fact.

Moreover, since petitioners established a *prima facie* case by *actual evidence of discriminatory motive and intent,* and not by the *McDonnell Douglas* presumption, petitioners submit that they *necessarily* created an issue of fact whether the reasons advanced by Lockheed were pretextual. Furthermore, petitioners submit that the policies underlying the manner in which courts are to approach discrimination cases in summary judgment motions mandate that once a plaintiff establishes an inference of discrimination by the decisionmaker by actual evidence, either direct or circumstantial, such inference necessarily precludes summary judgment.

The employer's intent to discriminate is a pure question of fact, and it is ordinarily one to be left to the trier of fact. *Pullman-Standard v. Swint,* 456 U.S. 273, 287-288; *United States Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 716 (1983). Because of this, and because of the inherent difficulty in discovering true motives, petitioners submit that an employee who can demonstrate an actual discriminatory animus on the part of a decisionmaker[5], such

---

[5]Obviously, the bias of a manager is not important where the decision in issue is prescribed by objective or external criteria. Such is not the case here, where management controlled the processing, approval and submission of the access requests.

as petitioners did, should be allowed to proceed to trial. As the court in Lowe stated:

> When a plaintiff does not rely exclusively on the presumption but seeks to establish a *prima facie* case through the submission of actual evidence, very little such evidence is necessary to raise a genuine issue of fact regarding an employer's motive; any indication of discriminatory motive — including evidence as diverse as "the [defendant's] treatment of [plaintiff] during his prior term of employment; [defendant's] reaction, if any, to [plaintiff's] legitimate civil rights activities; and [defendant's] general policy and practice with respect to minority employment," (cite) — may suffice to raise a question that can only be resolved by a factfinder. Once a *prima facie* case is established either by the introduction of actual evidence or reliance on the *McDonnell Douglas* presumption, summary judgment for the defendant will ordinarily not be appropriate on any ground relating to the merits because the crux of a Title VII dispute is the "elusive factual question of intentional discrimination," (citing *Burdine,* 450 U.S. at 255, n. 8). *Lowe,* 775 F.2d at 1009.

The court in *Lowe* went on to hold:

> Moreover, when a plaintiff has established a *prima facie* inference of disparate treatment through direct or circumstantial evidence of discriminatory intent, he will necessarily have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer's articulated reason for its employment decision. *Id.* at 1009.

To hold otherwise would require a plaintiff to not only provide evidence that the employer had a discriminatory intent through direct or circumstantial evidence, but also place the plaintiff in the almost impossible position of

producing evidence of what the wrongdoer's actual state of mind was when he or she made the employment decision under scrutiny. Thus, in this case, petitioners, whom the court of appeals agreed produced sufficient evidence to show that their management was racist and historically engaged in conduct of the type to which petitioners were continuing to be subjected in order to delay or prevent accesses, cannot have a trier of fact decide the case because these demonstrably racist managers deny that their true motive was other than legitimate. Under such circumstances, ascertainment of the employer's true motive is necessarily a matter for trial, where cross-examination and credibility can help sort out the truth.

Petitioners suggest that the court of appeals' approach reverses traditional policy considerations. In effect, under the appellate court's approach persons claiming unlawful discrimination are penalized in summary judgment proceedings because the wrongdoer will always present a later rationalization for the conduct in question, but will never admit to the actual discriminatory impetus. Where, as here, a discriminatory impetus on the part of the decisionmaker has been demonstrated, summary judgment in favor of the employer contravenes the important policies against unlawful discrimination.

Where the decision to be made is within the discretion of a manager and the evidence establishes that the manager is racist, it is absurd to grant summary judgment merely because the manager claims that he had good reasons for his decision. The contribution of his racist views versus the impact of his "good reasons" can only be resolved by a trial, and not by means of a motion for summary judgment.

II.

THE APPELLATE COURT CONTRAVENED ESTABLISHED CALIFORNIA LAW REGARDING CONTRACTS.

Petitioners presented claims for breach of contract and breach of the implied covenant of good faith and fair dealing. Lockheed asserted that these claims were not preempted by the LMRA because they were based on Lockheed's written Human Resources Directives ("HRD").

Although Lockheed never contended that its HRD did not constitute a contract, the appellate court ruled that summary adjudication of these claims was proper because petitioners had not established that the HRD constituted a contract between Lockheed and its employees. According to the court of appeals, the binding force of the HRD was "minimal" because Lockheed reserved the right to modify, rescind or revise the provisions at its sole discretion. The appellate court never explained how a contract can have a binding effect which is "minimal," nor did it cite any authority for its position. In fact, the appellate court's conclusion is contrary to California law, which is controlling in this case (*Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 733, 735 (9th Cir. 1986)).

In California a contract is not rendered illusory merely because it provides one party with discretionary power to vary the performance or the rights of the other party. First, California holds that any discretion afforded a party must be exercised in good faith, and hence such discretion is impliedly limited as a matter of law. *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 923, 216 Cal.Rptr. 345; *Powell v. Central California Federal Savings & Loan Association* 59 Cal.App.3d 540, 549, 130 Cal.Rptr. 640; *Okun v. Morton* (1988) 203 Cal.App.3d 805, 820, 250 Cal.Rptr. 220.

Second, a party's discretionary power does not render an agreement illusory "if the party's *actual* exercise of that power is reasonable." *Powell, supra,* 59 Cal.App.3d at 549 (emphasis in original). See also *Perdue, supra,* 38 Cal.3d at 923.

Here, Lockheed's actual power to vary its HRD is thus limited by the duty of good faith and fair dealing. Moreover, Lockheed, which never even raised this issue, provided absolutely no evidence that it changed the applicable directives. This was an invention of the court of appeals.

Hence, the court of appeals' decision was in contravention of the law.

III.

THE COURT OF APPEALS ERRED IN REJECTING EVIDENCE ON THE GROUNDS THAT IT WAS UNCORROBORATED AND SELF-SERVING.

Under California law, in order to maintain a civil action for discrimination based on a violation of the FEHA, a plaintiff must first have filed an administrative complaint with the DFEH. California Government Code § 12960; *Denney v. Universal City Studios, Inc.,* (1992) 10 Cal.App.4th 1226, 1232, 13 Cal.Rptr.2d 170. The administrative complaint must have been filed within one year of the discrimination. California Government Code § 12960.

Lockheed produced a declaration from the DFEH that it had no record of petitioner Charles Anderson filing an administrative complaint with it. Anderson, on the other hand, provided a declaration in which he stated that he did file one.

The appellate court held that Anderson's uncorroborated declaration was insufficient to raise a genuine issue of whether such a complaint was filed, relying on *Johnson v.*

Washington Metropolitan Transit Authority, 883 F.2d 125, 128 (D.C. Cir. 1989) and cases cited therein. The court's position was that a self-serving uncorroborated declaration could not create a genuine issue of fact.

The appellate court's holding is unsupported by law and is unsound. *Johnson* and the cases cited therein stand for the proposition that a plaintiff's self-serving declaration cannot alone create an issue of fact if there exists "persuasive evidence that the plaintiff has deliberately committed perjury." *Johnson,* 883 F.2d at 128.

Here, there was absolutely no claim of, much less any evidence of, perjury. The DFEH, which undoubtedly receives thousands of complaints, provided a declaration that it could not find Anderson's complaint. Clearly, the DFEH's failure to find the complaint cannot be deemed conclusive that none was filed, and thus is not persuasive evidence that Anderson committed perjury.

Moreover, the appellate court's position is illogical and would wreak havoc in any summary judgment situation. A party's declaration is undoubtedly self-serving in every case. A rule that such evidence must be corroborated to create a genuine issue of material fact would graft a new requirement virtually eliminating the ability of responding parties to defeat a motion for summary judgment.

CONCLUSION

The summary judgment should be reversed.

Date: August 11, 1998

LAW OFFICES OF GARY S. LEWIS

By: GARY S. LEWIS
Attorney for Petitioners

APPENDIX A

No. 96-56643

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIANE YOUNG, WILLIAM HURSKIN, and CHARLES ANDERSON,
Plaintiffs-Appellants,
v.
LOCKHEED ADVANCED DEVELOPMENT CO., a division of Lockheed Corporation; and LOCKHEED CORP., a Corporation,
Defendants-Appellees.

Filed April 8, 1998
Cathy A. Catterson, Clerk
U.S. Court of Appeals

DC No. CV-95-2231-JSL

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge presiding

Argued and Submitted March 2, 1998
Pasadena, California

Before: Wiggins and Kleinfeld, Circuit Judges,
and Smith, District Judge**

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Fern M. Smith, District Judge for the Northern District of California, sitting by designation.

Diane Young, William Hurskin, and Charles Anderson ("appellants") appeal the district court's grant of summary

judgment in favor of their employer, Lockheed Co., on three claims arising from the termination of their security accesses: 1) racial discrimination in violation of the California Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12940; 2) breach of contract; and 3) breach of the covenant of good faith and fair dealing.

Appellants contend that the district court erred in granting summary judgment on their FEHA claims on the ground they failed to establish a prima facie case of discrimination. They also contend that the district court erred in granting summary judgment on appellants' claims for breach of contract and breach of the covenant of good faith and fair dealing on the ground that these claims were preempted by the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I. FEHA Claims

A. Anderson's Claim

Filing a timely charge of discrimination with the California Department of Fair Employment and Housing ("DFEH") is a jurisdictional prerequisite to the filing of an action for damages under FEHA. *See Cal. Gov't. Code* § 12960. Plaintiffs have one year from the date of the alleged violation in which to file charges with DFEH.

DFEH has no record of any charges filed by Anderson prior to filing this action. Anderson's own uncorroborated and very generalized testimony that he filed a claim with DFEH prior to filing this action is not sufficient to raise a genuine issue as to whether or not he filed a claim. *See Johnson v. Washington Metropolitan Transit Authority,* 883 F.2d 125, 128 (D.C. Cir. 1989) (discussing cases in which self-serving testimony uncorroborated by other evidence did not create a genuine issue of material fact). Anderson has acquired a right to sue letter from DFEH since filing this

action, but his belated filing does not cure the jurisdictional defect in the present action. Summary judgment as to Anderson's claim was proper.

B. Young and Hurskin

California looks to federal employment discrimination law when analyzing FEHA discrimination claims. *Levy v. Regents of the Univ. of California,* 199 Cal.App.3d 1334, 1343; 245 Cal.Rptr. 576, 581 (1988). In order to establish a case of employment discrimination, a plaintiff must first establish a prima facie case of discrimination. If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its action. In order to prevail, the plaintiff must demonstrate that the employer's alleged reason for its action is a pretext for a discriminatory motive. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-05 (1973); *Lowe v. City of Monrovia,* 775 F.2d 998, 1004-05 (9th Cir. 1986), amended on other grounds, 784 F.2d 1407; *Diaz v. American Telephone & Telegraph,* 752 F2.d 1356, 1358-59 (9th Cir. 1985).

In order to establish a prima facie case of discrimination, a plaintiff must offer evidence that "gives rise to an inference of unlawful discrimination." *Lowe,* 775 F.2d at 1004-05. The district court ruled that plaintiffs had failed to establish a prima facie case because they had not provided evidence that non-minority employees were treated differently. Plaintiffs argue that such a showing is not required. Plaintiffs are correct.

There is no hard and fast rule regarding the particular type of evidence plaintiffs are required to adduce in order to establish a prima facie case of discrimination. Although courts routinely apply the four-part test set out in *McDonnell Douglas,* a plaintiff may attempt to raise an inference of

discrimination "in whatever manner is appropriate in the particular circumstances." *Diaz,* 752 F.2d at 1361.

> "Any indication of discriminatory motive — including evidence . . . [about defendant's] 'general policy and practice with respect to minority employment' — may suffice to raise a question that can only be resolved by a factfinder." *Lowe,* 775 F.2d at 1009 (internal citations omitted).

Evidence that similarly situated non-minority employees were treated differently is not required. *See Diaz,* 752 F.2d at 1360-61 (holding that the promotion of a member of plaintiff's class to the position plaintiff was seeking did not preclude plaintiff from establishing a prima facie case if he could show other facts raising an inference of discrimination).

Young and Hurskin offered evidence that they are members of a protected class, that they were accessed to a number of programs for over ten years, that their accesses were revoked, that there were substantial delays in Lockheed's processing of their applications for accesses, that managers at Lockheed had interfered in the past with the processing of access applications, and that managers who had the ability to interfere with accessing procedures had expressed or condoned racial bias and racially biased practices at Lockheed. These facts in combination are sufficient to raise an inference that plaintiffs' difficulties with their security accesses were the result of discrimination. Young and Hurskin have therefore established a prima facie case. The district court erred in granting summary judgment on the ground that they failed to do so.

Because this court is reviewing a district court's grant of summary judgment, it must examine the record to determine if there is any other basis for affirmance. *Diaz,* 752 F.2d at 1362; *Lowe,* 775 F.2d at 1007. If the result below

was correct, a reviewing court can affirm even if the court below relied on an erroneous ground. *Lowe,* 775 F.2d at 1007.

1. Young's Claim

Lockheed offered evidence that Young's accesses were revoked in 1993 because she was terminated in accordance with Lockheed's standard policies and practices. Young has not presented any evidence suggesting that Lockheed's explanation for the revocation of her accesses following her termination was pretextual.

With regard to Young's difficulties regaining her access to the V program, Lockheed offered evidence that at the time of her application, the V program was only processing limited numbers of access applications pursuant to instructions from the government. Young's manager Abby Rothman did not submit a program access request ("PAR") on her behalf because the CBA required Rothman to submit PAR's for other officers with more seniority. Young has failed to create a genuine issue of fact as to whether this explanation is pretextual. Her vague recollection of other employees' employment statuses is insufficient to undermine Lockheed's evidence that the CBA mandated that these officers precede Young in getting accesses when accesses were limited.

Young offered general and conclusory evidence that Lockheed had the means and the opportunity to delay or deny accesses without ever submitting paperwork to the government. Given the presence of adverse information in Young's record, none of this evidence raises a genuine issue of fact regarding Lockheed's motives. Summary judgment on Young's claim was proper.

2. Hurskin

Lockheed offered evidence that Hurskin's accesses were revoked in 1992 because the government had informed Lockheed that Hurskin did not meet the criteria for security accesses. Hurskin has presented no evidence indicating that the revocation of his security accesses in 1992 was based on anything other than the government's letter.

With regard to Hurskin's difficulties regaining access to secured programs, Lockheed offered evidence that Hurskin's record contained adverse information, including a reckless driving conviction and financial difficulties, and that Hurskin had failed to complete all of the required paperwork for the K program. Lockheed also offered evidence that in November 1995, Abby Rothman submitted a letter to the K program security office attesting to Hurskin's usefulness to the program.

With respect to his difficulties getting re-accessed, Hurskin has only presented general evidence regarding Lockheed managers' ability to interfere with the accessing process and evidence of racism in Lockheed's management ranks. Given the presence of adverse information in Hurskin's record, this evidence is insufficient to create a genuine issue of fact regarding the processing of Hurskin's access requests. The district court's decision to grant summary judgment on Hurskin's FEHA claim was therefore proper.

II. Contract-based claims

Appellants' employment relationship with Lockheed is governed by a CBA. Any claims based on the CBA are preempted by the LMRA. *Chmiel v. Beverly Wilshire Hotel,* 873 F.2d 1283, 1285-86 (9th Cir. 1989).

Appellants argue that their contract-based claims are exempt from LMRA preemption because they are based on Lockheed's Human Resources Directives ("HRD") and

not on the CBA. Appellants have not established, however, that the HRD constitutes a contract between Lockheed and its employees. Given that there is a CBA governing the employment relationship here and that Lockheed has reserved the right in the HRD to "modify, supplement, rescind, revise, or otherwise alter any provision of any policy as it deems necessary or appropriate at its sole discretion," the binding force of the HRD appears to be minimal. Appellants' contract-based claims therefore lack any legal basis. Summary Judgment was proper.

AFFIRMED.

APPENDIX B

CV-95-2231-JSL

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE J. SPENCER LETTS,
PRESIDING UNITED STATES
DISTRICT COURT JUDGE

DIANE YOUNG, et al.,
Plaintiffs,

vs.

LOCKHEED ADVANCED DEVELOPMENT,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Monday, September 9, 1996
Los Angeles, California

Motion for Summary Judgement

Terry Kramer, CVR
Official Reporter
United States District Court
419 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 680-1908

Appearances:

For the Plaintiffs:

Law Offices of Jeffrey McIntyre
14540 Haynes Street, Suite 100
Van Nuys, California 91411

BY: Jeffrey McIntyre
Attorney at Law

For the Defendant:

Quinn, Emanuel, Urquhart & Oliver
865 South Flower Street, 10th Floor
Los Angeles, California 90017

BY: Eric Emanuel
Attorney at Law

* * *

THE COURT: Here's what it looks like to me.

You haven't really stated a prima facie case in classic terms because you haven't put any nonminority person in similar circumstances; you haven't even alleged that anybody is ever going to be in similar circumstance.

The plaintiffs individually, it appears pretty clear why they're upset and that they have a right to be upset, and, my goodness, if Lockheed, with knowledge of this, is letting this kind of thing go on, they ought to be embarrassed, and some people's heads ought to roll.

I'm not saying that is the truth of it, I'm just saying if those averments were proven, people that live in this town — and I swear I think people who live in this century — have no business tolerating that, doing it or tolerating it.

That is so clear that right now I continue to doubt it a little bit, but it doesn't matter, they can't have that.

Is that an unacceptable work environment, of course it is, if true; any fool knows that, we're not arguing about that.

The trouble is that you can't make the connection between the work environment and the actions taken, and you haven't. I don't think you can sustain a cause of action for what you have proven.

MR. McINTYRE: If I may, Your Honor, our position would be — and I don't think it's out of line — that the matters alleged as what occurs, for example, the necessity that someone have to sign their paperwork because they're told —

THE COURT: No, you've not shown me a single circumstance where the initiative came either from the government, which it didn't, two of your three circumstances, or started with a termination.

That's why I feel so badly for your people, all the things that were happening that they thought there was everybody else around and they thought all of these things ought to be happening in the ordinary course and they weren't, and they kept saying to themselves, there's something wrong here, what can it be, well, it's all these miserable people that behave so badly and they're doing it to me, I don't blame them for thinking that, I'd have thought that, too.

Those letters, both of them, one of them directly and the other one indirectly, both say you can't tell them, so you're sitting there with people that don't know what's happening but it's happened.

MR. McINTYRE: Your Honor if I may, the one letter states that in fact the person is to be advised of their rights in regard to Mr. Hurskin.

Paragraph 2 states, *Either something is to be done to see that it gets taken care of, or he is to be informed of that.* That's not our only issue, though, Your Honor.

We are claiming — it is our position — that the continued failure to obtain access, which people can get even if they've been turned down once —

THE COURT: No; no, that's different. Two of these people had access, they got terminated.

Mr. McINTYRE: One was terminated, two had financial troubles.

THE COURT: Two were terminated. There are letters from the government directing Lockheed, take these people off the access. You've not shown a single comparable circumstance to that.

Of course people get access. It's very different from when the government says, I want access denied, and the government said it.

Mr. McINTYRE: Your Honor, I understand that.

The problem lies in that the persons have attempted to again gain access and there's —

THE COURT: And you —

Mr. McINTYRE: — no person they can — they've even gotten —

THE COURT: Forgive me, but it's better if while I'm talking you stop, even though I'm interrupting you.

Mr. McINTYRE: I apologize.

THE COURT: It doesn't matter.

It may be that there is an ordinary course of what it takes to get access. You haven't alleged and you haven't an ability to allege because you don't have the ordinary prima facie case.

You don't have a single instance or even a thought of an instance that when the government took the initiative first and said, I want this person out, that there's an ordinary

course about how you get back in, there's not an instance of that.

There is not an instance anywhere in your papers that if a person, subject to grievance proceedings, is terminated, what happens when they're reinstated.

And to suggest that what happens with people that are not terminated or have not had the government take the initiate is what should be looked at, I don't think so.

MR. McINTYRE: If I may, Your Honor —

THE COURT: You're going to have to be very quick, because that's a ruling, actually.

MR. McINTYRE: Well, if that's the ruling, I do believe that in fact these people got their access back in some instances. Even Ms. Young got her access back in one instance. She has not received a number of the other —

THE COURT: And if I were on the other side, I would jump up right this second — except I'm winning, so I wouldn't — and say, I rest my case. It's not an across-the-board denial.

MR. McINTYRE: But she's not getting —

THE COURT: Of course not.

MR. McINTYRE: That only —

THE COURT: And not only that, she hasn't alleged any; none of them have really alleged any actual damages, but it doesn't matter, I didn't get that far. They haven't alleged anybody in comparable circumstances; they have to.

I say again, whether they have some causes of action they haven't brought, I have no opinion, but if what I read is true — and you may quote me — if it's true and those people know it, that's an outrage and they ought to be embarrassed and these people should be apologized to, they

should get them in there and say, gee, we couldn't tell you, we didn't think we could tell you, here's what happened, and we're sorry.

And maybe they ought to just give them some money as volunteers. This is awful, I'm sorry you had your feelings hurt so badly, it's terrible, and we want to do something to make it right with you.

I don't think it's ever going to happen that some court is going to tell them they have to, that's different, not on these pleadings. And I'm not at all sure there are any pleadings that you could get to, not while they're on the payroll.

MR. McINTYRE: Thank you, Your Honor.

APPENDIX C

No. 96-56643

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIANE YOUNG; WILLIAM HURSKIN;
CHARLES ANDERSON,
Plaintiffs-Appellees,

v.

LOCKHEED ADVANCED DEVELOPMENT COMPANY,
a division of Lockheed Corporation;
LOCKHEED CORPORATION, a Corporation,
Defendants-Appellants.

Filed May 14, 1998
Cathy A. Catterson, Clerk
U.S. Court of Appeals

DC No. CV-95-2231-JSL

ORDER

Before: WIGGINS and KLEINFELD, Circuit Judges, and SMITH*, District Judge.

The panel has voted unanimously to deny the petition for rehearing. Judge Kleinfeld has voted to reject the suggestion for rehearing en banc, and Judges Wiggins and Smith have recommended the same.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

** The Honorable Fern M. Smith, United States District Judge for the Northern District of California, sitting by designation.

Supreme Court, U.S.
FILED
OCT 19 1998
OFFICE OF THE CLERK

No. 98-279

In The

Supreme Court of the United States

October Term, 1998

DIANE YOUNG, WILLIAM HURSKIN
and CHARLES ANDERSON,

Petitioners,

vs.

LOCKHEED ADVANCED DEVELOPMENT COMPANY, a division of Lockheed Corporation; and LOCKHEED CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

SCOTT B. KIDMAN
Counsel of Record
KIM Y. GOHATA
QUINN EMANUEL URQUHART
OLIVER & HEDGES, LLP
Attorneys for Respondents
865 South Figueroa Street
10th Floor
Los Angeles, CA 90017-2543
(213) 624-7707

149094

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

PARTIES TO THE PROCEEDINGS

Pursuant to Sup. Ct. R. 29.6, respondents submit the following corporate disclosure statement:

Aditivos Y Minerales Aminsa, S.A.
Aeroplex of Central Europe
Agridyne Technologies, Inc.
Airod Sendirian Berhad
Airport Group Canada, Inc.
Airport Group Int'l GmbH
Airport Group International Holdings, LLC
Airport Group International, Inc.
Airport Group United Kingdom, Ltd.
Alliance Emirates Development Co.
American Stone Company
Atlantic Granite Company
Automated Test International Ltd. Partnership
Bahama Rock Limited
Bayou Mining, Inc.
Beijing Huayun Loral Meteorological Radar Systems Co., Ltd.
Bocep Venturers
CalComp Technology, Inc.
Central Rock Company
Concrete Supply Company
Conic Corp.
Cure, Inc.
Earth Observation Satellite Company
Eco-21 Technologies, L.P.
EO Systems International, Ltd.
Euro-Art Radar Technology Gmbh
GETAC Corp.
Guangzhou Aircraft Maintenance Engineering Co. Ltd.
Gulf Diagnostic Centre
Gulf Technology Systems Group

Hellenic Business Development/Investment Co., S.A.
Iridium, LLC
Kaser Corp.
LAH Limited
LC Acquiring Corp.
Letlock-Saudi Arabia
Lockheed Advanced Development Co.
Lockheed Aeronautical Systems Co.
Lockheed Aircraft Argentina, S.A.
Lockheed Aircraft International, Ltd.
Lockheed Aircraft Service Company
Lockheed Aircraft Service Company Ontairo
Lockheed Aircraft Services-Overseas
Lockheed Ft. Worth Company
Lockheed-Hellas, S.A.
Lockheed Information Technology Co.
Lockheed Investment Holding Co., A.S.
Lockheed Khrunichev Energia Int'l Inc.
Lockheed Martin Aerospace Corp.
Lockheed Martin Aerospace Holdings, Inc.
Lockheed Martin Aerospace Int'l Inc.
Lockheed Martin Aerospace Systems Integration Corp.
Lockheed Martin Beryllium Corp.
Lockheed Martin Corporation
Lockheed Martin Commerical Space Co., Inc.
Lockheed Martin Defense Systems Corp.
Lockheed Martin Electro-Optical Systems, Inc.
Lockheed Martin Environmental Systems, Inc.
Lockheed Martin Fairchild Corp.
Lockheed Martin Federal Services Corp.
Lockheed Martin Federal Systems, Inc.
Lockheed Martin Finance Corp.
Lockheed Martin Hycor, Inc.
Lockheed Martin IMS Canada, Inc.
Lockheed Martin Int'l Air Traffic Corp.

Lockheed Martin Int'l Belgian Services Ltd.
Lockheed Martin Int'l Commercial Sales, Inc.
Lockheed Martin International, Inc.
Lockheed Martin International, Ltd.
Lockheed Martin Int'l, S.A.
Lockheed Martin Int'l Systems Ltd.
Lockheed Martin IR Imaging Systems, Inc.
Lockheed Martin Librascope Corp.
Lockheed Martin Medical Imaging Systems, Inc.
Lockheed Martin Microcom Corp.
Lockheed Martin Overseas Services Corp.
Lockheed Martin/Rolm Mil-Spec. Corp.
Lockheed Martin Sales Office Corp.
Lockheed Martin Securities, Inc.
Lockheed Martin Sonar Systems Corp.
Lockheed Martin Systems International, Inc.
Lockheed Martin Tactical Systems, Inc.
Lockheed Martin UK Management Services Limited
Lockheed Martin Vought Services, Inc.
Lockheed Martin Vought Systems, Corp.
Lockheed of Turkey, Inc.
Longbow LLC
Loral Space & Communications Ltd.
Louisiana Dredging Company
M4 Environmental, L.P.
M4 Environmental Management, Inc.
Martin Marietta Australia Pty. Ltd.
Martin Marietta EO Associates (Europe), Inc.
Martin Marietta Game Elektronik
Martin Marietta Magnesia Specialties, Inc.
Martin Marietta Materials Canada Ltd.
Martin Marietta Materials, Inc.
MEADS International, Inc.
MedDetect, LLC
Microelectronics & Computer Technology Corp.

Mid-South Weaver
New Cure, Inc.
NS CalComp Corp.
N.V. CalComp S.A.
Orion Network Systems, Inc.
Pacific Aerospace Corp. Ltd.
PDES, Inc.
PGM Systems, Ltd.
PGSUS, LLC
Radarsat International, Inc.
Rational Software Corp.
RGE Engineering Service Company
Software Productivity Consortium, Inc.
Software Productivity Consortium Ltd., Partnership
Space Imaging, Inc.
Standard Magnesia Ltd.
Superconductor Technologies, Inc.
Superior Stone Company
Suramericana De Refractarios, C.A.
Systems Operations, Inc.
Thompson Consultants International, Inc.
TI/Martin Javelin Joint Venture
Toshiba Electronic Systems Co., Ltd.
Tusas Aerospace Industries, Inc.
United Space Alliance, LLC
Western Investor Technology Group, Inc.
Western Investor Technology Group, LP

TABLE OF CONTENTS

	Page
Parties to the Proceedings	i
Table of Contents	v
Table of Cited Authorities	vi
Statement of the Case	1
Summary of Argument	8
Reasons for Denying the Writ	10
I. Neither The Ninth Circuit — Nor Any Other Circuit — Has Held That A Prima Facie Showing Is Sufficient To Defeat Summary Judgment. . .	10
A. Petitioners Do Not Raise A Conflict Within The Ninth Circuit	11
1. Petitioners have not cited the amended Lowe opinion	11
2. The Ninth Circuit has not adopted petitioners' interpretation of Lowe . .	13
B. Petitioners Do Not Raise A Conflict Among The Circuits	16
C. Petitioners Do Not Raise A Conflict With This Court	17

Table of Cited Authorities

Page

II. Petitioners' Contract Claims Are Preempted By The LMRA, Thus Whether Or Not An Employer's Human Resources Policies May Form The Basis Of An Implied Contract Is Immaterial. 18

III. The Issue Is Not Whether Petitioner Anderson Commenced His Administrative Proceedings But Whether He Exhausted Them. 22

Conclusion 24

TABLE OF CITED AUTHORITIES

Cases:

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) . 19

Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (CA7 1994) 17

Bradley v. Harcourt, Brace & Co., 104 F.3d 267 (CA9 1996) 15

Chmiel v. Beverly Wilshire Hotel Co., 873 F.2d 1283 (CA9 1989) 19, 20

Commodore Home Systems, Inc. v. Superior Court, 32 Cal. 3d 211, 185 Cal. Rptr. 270 (1982) 22

Cotton v. City of Alameda, 812 F.2d 1245 (CA9 1987) 15

Table of Cited Authorities

	Page
Davis v. Chevron U.S.A., 14 F.3d 1082 (CA5 1994) ..	16
DeHorney v. Bank of America Nat'l Trust & Sav. Ass'n, 879 F.2d 459 (CA9 1989)	15
Denney v. Universal City Studios Inc., 10 Cal. App. 4th 1226, 13 Cal. Rptr. 2d 170 (1992)	22
Durham v. Xerox Corp., 18 F.3d 836 (CA10 1994), *cert. denied*, 513 U.S. 819 (1994)	17
Federal Deposit Ins. Corp. v. Henderson, 940 F.2d 465 (CA9 1991)	13, 14
Franchise Tax Bd. v. Laborers Vacation Trust, 463 U.S. 1 (1983)	20
Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309 (CA6 1989)	17
Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104 (CA8 1994), *cert. denied*, 513 U.S. 946 (1994)	17
Geary v. Visitation of the Blessed Virgin Mary, 7 F.3d 324 (CA3 1993)	16
Gonzales v. MetPath, Inc., 214 Cal. App. 3d 422, 262 Cal. Rptr. 654 (1989)	12
Grywczynski v. Shasta Beverages, Inc., 606 F. Supp. 61 (N.D. Cal. 1984)	23

Table of Cited Authorities

Page

LeBlanc v. Great Am. Ins. Co., 6 F.3d 836 (CA1 1993), *cert. denied*, 511 U.S. 1018 (1994) 16

Levy v. Regents of University of California, 199 Cal. App. 3d 1334, 245 Cal. Rptr. 576, *cert. denied*, 488 U.S. 893 (1988) 11, 12

Lindahl v. Air France, 930 F.2d 1434 (CA9 1991) ... 15

Lowe v. City of Monrovia, 784 F.2d 1407 (CA9 1986), *amending* 775 F.2d 998 (CA9 1985) 11, 12, 13, 14, 17

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 18

Miller v. United Airlines, Inc., 174 Cal. App. 3d 878, 220 Cal. Rptr. 684 (1985) 22, 23

Mitchell v. Data Gen. Corp., 12 F.3d 1310 (CA4 1993) 16

Mixon v. Fair Employment and Housing Commission, 192 Cal. App. 3d 1306, 237 Cal. Rptr. 884 (1987) . 12

Paige v. Henry J. Kaiser Co., 826 F.2d 857 (CA9 1987), *cert. denied*, 486 U.S. 1054 (1988) 19, 20

Republic Steel Corporation v. Maddox, 379 U.S. 650 (1965) 20, 21

Table of Cited Authorities

	Page
Saulpaugh v. Monroe Community Hosp., 4 F.3d 134 (CA2 1993), *cert. denied*, 510 U.S. 1164 (1994)	16
Schuler v. Chronicle Broadcasting Co., 793 F.2d 1010 (CA9 1986)	16
Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104 (CA9 1991)	14, 15, 17
Sorosky v. Burroughs Corp., 826 F.2d 794 (CA9 1987)	15
SS Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959)	23
St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993)	12, 17, 18
Steckl v. Motorola, Inc., 703 F.2d 392 (CA9 1983)	14
Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278 (CA11 1997)	17
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	12, 18
United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)	21
Wallis v. J.R. Simplot Co., 26 F.3d 885 (CA9 1994)	14, 15

Table of Cited Authorities

	Page
Wisniewski v. United States, 353 U.S. 901 (1957)	11
Young v. Anthony's Fish Grottos, Inc., 830 F.2d 993 (CA9 1987)	20
Statutes:	
28 U.S.C. § 1367	1, 7, 21
29 U.S.C. § 185	1, 7, 21
Cal. Govt. Code § 12960	23
Rule:	
Supreme Court Rule 10(a)	10, 11

Respondents Lockheed Advanced Development Company and Lockheed Corporation ("Lockheed") respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Court of Appeals decision in this case.

STATEMENT OF THE CASE

Jurisdiction. The jurisdiction of the district court was invoked under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 and 28 U.S.C. § 1367 (supplemental jurisdiction).

This action. This case arises out of the petitioners' loss of "access" — a term of art in the defense industry — to certain classified military programs. None of the petitioners allege they lost their jobs because of their loss of access.

Petitioners' employment. Since 1980, petitioners have been employed by Lockheed as plant protection officers.[1] Plant protection officers are security guards. They control movement in and out of Lockheed's facilities and secure the buildings and designated work areas within the facilities.[2] Many of those buildings house classified and restricted government programs, such as the United States Air Forces' F-117 stealth fighter.

Government security clearances and accesses. Plant protection officers, like all Lockheed employees who work on classified government programs, are required to hold a

1. Transcript of deposition of Charles Anderson taken March 28, 1996 ("Anderson Tr."), 10:6-8 (R.10); Transcript of deposition of William Hurskin dated May 3, 1996 ("Hurskin Tr."), 19:22-20:14 (R.10); Transcript of deposition of Diane Young taken October 31, 1995 ("Young Tr."), 11:23-24; 13:3-10 (R.10).

2. Hurskin Tr., 23:17-25:20 (R.10).

government security clearance.[3] Clearances are granted by the Industrial Security Clearance Office of the United States Department of Defense and fall into the categories of confidential, secret and top secret.[4]

In addition to a government "clearance," military defense workers, including plant protection officers, must also obtain "access"[5] to certain programs, generally the nation's most secret military programs, known as "special access" programs. Special access programs have restrictions and controls beyond those required for "secret" or "top secret" clearances.[6] Some of the special access programs are so sensitive that they are not identified by name, but instead are known only by a letter, such as the "Y" program.[7]

Decisions to grant or deny access are made by the defense contractor's "customer" — usually a branch of the United States Armed Forces, such as the Air Force or the Navy.[8] The *customer*, not the defense contractor, determines what the criteria for access will be, how many will have access and who will have access.[9] If the customer denies an employee access,

---

3. Declaration of Kenneth A.U. Hassen dated June 28, 1996 ("Hassen Decl."), ¶ 4 (R.10).

4. *Id.*

5. Hassen Decl., ¶ 5 (R.10).

6. Hassen Decl., ¶ 6 (R.10).

7. Hassen Decl., ¶ 8 (R.10).

8. Hassen Decl., ¶ 11 (R.10).

9. Hassen Decl., ¶¶ 11 and 13 (R.10).

it will inform Lockheed of the decision, but not the basis for the decision.[10] Lockheed is legally and contractually bound to follow the customer's decision to deny an employee access.[11]

Access criteria. A security clearance is a prerequisite for, but does not guarantee, access to a special access program.[12] Access typically involves closer scrutiny of an individual's background.[13] Employees therefore must disclose background information, including "adverse information." The types of information considered by customers to be adverse, and which may therefore result in the customer denying or revoking an individual's access, include evidence of financial instability (such as bankruptcies, tax liens and wage garnishments), evidence of drug or alcohol abuse, arrest records and any other information that might mean an employee is susceptible to influence.[14] Moreover, the government's discovery that an individual has failed to disclose adverse information may be as detrimental as, or more detrimental than, the adverse information itself.[15]

Petitioner Charles Anderson's accesses. In January 1992, Lockheed received a letter from the United States Air Force advising Lockheed that petitioner Anderson was "no longer eligible for access to any Special Access Programs" and

10. Hassen Decl., ¶ 12 (R.10).

11. Hassen Decl., ¶ 9 (R.10).

12. Hassen Decl., ¶ 14 (R.10).

13. *Id.*

14. Hassen Decl., ¶ 15 (R.10).

15. Hassen Decl., ¶ 16 (R.10).

instructing Lockheed to immediately revoke petitioner Anderson's access to all such programs.[16] Pursuant to this directive, Lockheed performed the administrative task of removing from petitioner Anderson's identification badge the indicators necessary for access to special program areas. Consistent with its practice, the government did not inform Lockheed of the reason for its decision to revoke petitioner Anderson's accesses.[17] However, it is undisputed that there was "adverse information" that would have justified the government's decision to revoke petitioner Anderson's access. During pre-trial discovery, petitioner Anderson admitted that he had filed for bankruptcy, had been arrested for kidnaping, had been audited by the Internal Revenue Service and found to owe back taxes and that he had debts that were turned over to collection agencies.[18] Petitioner Anderson also admitted that he had been interviewed by a government investigator about a number of these issues in 1991, at which time he executed a declaration admitting that his monthly expenses exceed his monthly income.[19]

Petitioner William Hurskin's accesses. In November 1992, Lockheed received a letter from the United States Air Force stating that petitioner Hurskin "does not meet the criteria for access to any Special Access Program" and instructing Lockheed to revoke petitioner Hurskin's access to all such programs.[20] As with petitioner Anderson, the government did

16. Hassen Decl., ¶ 12 and Exhibit D thereto (R.10).

17. *Id.*

18. Anderson Tr., 124:10-130:22 (R.10).

19. Anderson Tr., 180:13-184:9 (R.10).

20. Hassen Decl., ¶ 12 and Exhibit E thereto (R.10).

not advise Lockheed of the reason for its decision to revoke petitioner Hurskin's accesses.[21] Like petitioner Anderson, petitioner Hurskin also admitted at his deposition to "adverse information." Eight months before his access was revoked he had been arrested for drunk driving. Petitioner Hurskin further admitted that he did not immediately report this arrest to the government security unit, but rather waited until after he had pleaded guilty to the lesser charge of reckless driving to do so.[22] In addition, petitioner Hurskin advised government investigators that he was having difficulty meeting his financial obligations[23] and it is undisputed that he had previously filed for bankruptcy and had his wages garnished.[24]

Petitioner Diane Young's accesses. In December 1993, petitioner Young was terminated from Lockheed's payroll for violation of the company's attendance policy.[25] Before her termination, petitioner Young had access to four programs identified only by the letters "N," "Y," "V" and "K."[26] Pursuant to government regulations, when employees are terminated from the payroll, the employees are "debriefed" and their accesses are withdrawn.[27] That is what happened to petitioner Young.[28] Petitioner Young subsequently filed a grievance

---

21. *Id.*

22. Hurskin Tr., 191:1-193:23 (R.10).

23. Hurskin Tr., 196:9-197:17 (R.10).

24. Consolidated Statement of Uncontroverted Facts and Conclusions of Law, No. 20 (R.17B).

25. Young Tr., 16:5-12; 22:4-21 (R.10).

26. Young Tr., 22:22-23:1 (R.10).

27. Hassen Decl., ¶ 17 (R.10); Young Tr., 21:4-11 (R.10).

28. Hassen Decl., ¶ 17 (R.10); Young Tr. 22:22-23:7 (R.10).

regarding her termination pursuant to provisions of the Collective Bargaining Agreement between Lockheed and the union representing plant protection officers. The settlement of that grievance resulted in petitioner Young's employment being reinstated in February 1994.[29]

Upon her return to work, petitioner Young was submitted for, and granted access to the Y and the N programs.[30] She was not submitted for access to the V program because, at that time, the government had imposed a limit on the number of plant protection officers who could be given access to the V program.[31] Pursuant to the terms of the Collective Bargaining Agreement, petitioner Young was not eligible to be submitted for access to the V program.[32]

Petitioner Young's department manager requested that she be submitted for access to the K program.[33] To receive access to a program, an employee must first complete security questionnaires disclosing any adverse information (*e.g.*, bankruptcies, wage garnishments, arrests, drug abuse) for consideration by the customer.[34] At the time of the hearing on Lockheed's motion for summary judgment, Lockheed's K

---

29. Young Tr. 16:5-17:10 (R.10).

30. Young Tr., 54:5-9; 55:3-15 (R.10).

31. Declaration of Gene Souza dated June 27, 1996, ¶ 5 (R.10); Declaration of Abby Rothman dated June 28, 1996 ("Rothman Decl."), ¶ 4 (R.10).

32. Rothman Decl., ¶¶ 9-10 (R.10).

33. Rothman Decl., ¶ 4 (R.10).

34. Hassen Decl., ¶ 10 (R.10).

program security office had not yet received from petitioner Young all the paperwork necessary in order for her to be considered for access to the K program.[35]

Lockheed's motion for summary judgment. On July 1, 1996, Lockheed moved for summary judgment on the grounds that: (i) Lockheed had legitimate, non-discriminatory reasons for the withdrawal of petitioners' accesses and petitioners had no evidence that Lockheed's stated reasons were a pretext for race discrimination; (ii) petitioners Hurskin and Anderson failed to exhaust their administrative remedies under the California Fair Employment and Housing Act ("FEHA"); and (iii) petitioners' causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing are preempted by § 301 of the Labor Management Relations Act ("LMRA").

District Court opinion. On September 9, 1996, the district court granted Lockheed's motion for summary judgment because petitioners did not, and could not, show any connection between the loss of their accesses and any alleged racial discrimination. In granting Lockheed's motion for summary judgment, the district court stated:

> The trouble is that you [petitioners] can't make the connection between the work environment and the actions taken, and you haven't. I don't think you can sustain a cause of action for what you have proven.[36]

Court of Appeals opinion. Petitioners appealed the judgment and the Court of Appeals, in an unpublished opinion,

---

35. Declaration of Gary De Boise dated June 28, 1996, ¶¶ 9-11 (R.10).

36. Transcript of Proceedings at 3b, Appendix B to the Petition.

affirmed. The Court of Appeals held that: (i) petitioner Anderson's cause of action for discrimination on the basis of race in violation of the FEHA fails as a matter of law because he failed to exhaust his administrative remedies; (ii) petitioners Young and Hurskin's causes of action for discrimination on the basis of race in violation of the FEHA fail as a matter of law because they failed to present evidence sufficient to raise a triable issue of fact that Lockheed's stated reasons were pretextual; and (iii) petitioners' causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing fail as a matter of law because they are preempted by the LMRA.[37]

SUMMARY OF ARGUMENT

Petitioners argue that the Court of Appeals erred because the state of the law in the Ninth Circuit requires that a court automatically deny summary judgment for the employer where the plaintiff has made a *prima facie* showing of discrimination. According to petitioners, a *prima facie* case always creates a triable issue of fact. Petitioners' entire argument rests upon a 1985 Ninth Circuit case. That opinion, however, was subsequently amended to add clarifying language obviating petitioners' argument. Consequently, neither the case petitioners rely on, nor any other Ninth Circuit opinion, nor any opinion in any other circuit, nor this Court has adopted the rule that a *prima facie* case is, by itself, a sufficient showing to defeat summary judgment when, as here, the employer has advanced a legitimate, non-discriminatory reason for the discharge and there is no evidence that the reason is pretextual.

---

37. United States Court of Appeals Opinion dated April 8, 1998 ("Opinion"), Appendix A to the Petition.

Petitioners' second argument is that the appellate court erroneously held that an employer's Human Resources policies cannot form the basis of a valid employment contract where the employer reserves the right to unilaterally modify the terms of the policies. Petitioners, however, have created this "issue" by taking one sentence of the appellate court's decision out of context. Petitioners here are union members subject to a Collective Bargaining Agreement. The court below correctly held that petitioners' contract claims are therefore preempted by the LMRA and petitioners could not rely on Human Resources policies to create a different employment contract.

Finally, petitioners argue that the appellate court erred when it held that petitioner Anderson's uncorroborated declaration was not sufficient to raise a genuine issue of fact as to the date he filed a charge of discrimination. The issue below, however, was not when plaintiff filed his charge, but whether he had exhausted his administrative remedies. Under California state law, a plaintiff must obtain a right to sue letter before filing suit for violation of the state anti-discrimination statutes. That letter is a jurisdictional prerequisite and it is undisputed that petitioner Anderson did not obtain one. The issue petitioners have raised — when petitioner Anderson filed the original charge — has nothing to do with the ultimate outcome of the case.

Because petitioners have failed to raise an issue warranting this Court's review, the petition for writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

I.

NEITHER THE NINTH CIRCUIT — NOR ANY OTHER CIRCUIT — HAS HELD THAT A PRIMA FACIE SHOWING IS SUFFICIENT TO DEFEAT SUMMARY JUDGMENT.

Petitioners' first Question Presented is whether pursuant to the FEHA:

> An employee who has established a *prima facie* case of employment discrimination by means of actual evidence of racial animus by the decision maker has necessarily created an issue of fact as to whether the employer's proffered reasons for its conduct are pretextual.[38]

Petitioners have failed to raise an issue warranting Supreme Court review. "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons."[39] No such compelling reasons are present here.[40]

---

38. Petition at 7.

39. *Sup. Ct. R.* 10.

40. Petitioners actually misrepresent the record and the appellate court decision in framing this issue. Petitioners assert that the appellate court concluded that petitioners established a *prima facie* case with "actual evidence" of discriminatory motive or intent by the "decision-maker." *See e.g.*, Petition at 8, 10. However, petitioners produced no such evidence below and the appellate court made no such ruling. The appellate court merely concluded that the evidence presented by petitioners Young and Hurskin raised an "inference" of discrimination. Opinion at 4a, Appendix A to the Petition.

A. Petitioners Do Not Raise A Conflict Within The Ninth Circuit

Petitioners claim that the Court of Appeals erred by failing to find that petitioners had created a triable issue of fact by establishing a *prima facie* case of discrimination.[41] Petitioners rely entirely on a 1985 Ninth Circuit opinion — *Lowe v. City of Monrovia*, 775 F.2d 998 (CA9 1985) — which stated that, once a plaintiff establishes a *prima facie* case, summary judgment for the defendant "will *ordinarily* not be appropriate." 775 F.2d at 1009 (emphasis added). That opinion, however, was subsequently amended. That amendment added clarifying language which obviates petitioners' argument. Moreover, neither this Court nor the Ninth Circuit nor any other United States Court of Appeals has adopted petitioners' interpretation of the summary judgment standard set forth in *Lowe*. Thus, petitioners have raised an issue that does not constitute a conflict within the Circuit — let alone a conflict among the Circuits. Accordingly, the issue does not warrant Supreme Court review.[42]

1. *Petitioners have not cited the amended Lowe opinion*

In state law discrimination cases, California courts apply the federal analytical model developed under Title VII. *Levy v. Regents of University of California*, 199 Cal. App. 3d 1334, 1343, 245 Cal. Rptr. 576, 581, *cert. denied*, 488 U.S. 893

41. Petition at 10.

42. While the Supreme Court may grant certiorari to review a conflict between the Courts of Appeals on an "important matter" (*see Sup. Ct. R.* 10(a)), a conflict between different panels within the same Court of Appeals ordinarily does not warrant Supreme Court review (*Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties")).

(1988). The ultimate burden of proof and persuasion in employment discrimination suits is placed squarely on the plaintiffs. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Mixon v. Fair Employment and Housing Commission*, 192 Cal. App. 3d 1306, 1319, 237 Cal. Rptr. 884, 891 (1987).

Under this framework, the plaintiffs must first prove a *prima facie* case of wrongful discrimination. *Gonzales v. MetPath, Inc.*, 214 Cal. App. 3d 422, 426, 262 Cal. Rptr. 654, 657 (1989); *Levy*, 199 Cal. App. 3d at 1343, 245 Cal. Rptr. at 581. If they do so, the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employer's decision. *Mixon*, 192 Cal. App. 3d at 1319, 237 Cal. Rptr. at 891. Once the employer produces such evidence, any inference of discrimination drops from the case. *Burdine*, 450 U.S. at 255-56; *Levy*, 199 Cal. App. 3d at 1344, 245 Cal. Rptr. at 581. The plaintiffs must then prove that the proffered justification is not the true reason for the employment decision, but is a mere pretext for actual discrimination. *Id.*

Petitioners ignore this well-established standard. Instead, petitioners contend that a plaintiff always creates a triable issue of fact simply by establishing a *prima facie* case, even when the employer has articulated a legitimate, non-discriminatory reason for the adverse employment action that is not pretextual. Petitioners arrive at their position by overstating *Lowe*. Although petitioners quote the *Lowe* opinion at length,[43] they fail to include the following clarifying language subsequently amending the opinion:

> The principles described above do not prevent the summary disposition of meritless suits but simply

---

43. Petition at 11.

> ensure that when a genuine issue of material fact exists a civil rights litigant will not be denied a trial on the merits.

Lowe v. City of Monrovia, 784 F.2d 1407, 1407 (CA9 1986), *amending* 775 F.2d 998. In filing the instant petition, petitioners have failed to heed Judge Reinhardt's instruction.

The absurdity of petitioners' contention is demonstrated by the facts of this case. Petitioners claim that they were discriminated against on the basis of their race because their security "accesses" were revoked. The Court may assume that petitioners could satisfy the minimal requirements of a *prima facie* case: petitioners are black, their accesses were revoked and non-black employees did not have their accesses revoked as well. Under petitioners' logic, even if it is undisputed that the government — not the employer — decided to revoke the accesses, *i.e.*, the employer had legitimate, non-discriminatory reasons for the adverse action, the case must still go to a jury even though petitioners had no evidence that the legitimate, non-discriminatory reasons were pretextual. This is exactly the scenario Judge Reinhardt warned against: a meritless case would go to trial.

2. *The Ninth Circuit has not adopted petitioners' interpretation of Lowe*

That petitioners' interpretation of *Lowe* is not correct is further demonstrated by subsequent Ninth Circuit decisions. Those cases granted summary judgment, despite the plaintiffs' *prima facie* showing. Indeed, at least two opinions explicitly rejected the argument advanced by petitioners here: that summary judgment is never appropriate if a plaintiff can establish a *prima facie* case. In *Federal Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 473 n.16 (CA9 1991), the Court noted

that *Lowe* was subsequently amended to include language clarifying its holding. In *Henderson*, the court upheld summary judgment for the employer on the grounds that the plaintiff's direct evidence of discriminatory intent was not sufficient to raise a genuine issue of fact as to the employer's motive. According to *Henderson*, the appropriate standard is whether "there exists a genuine issue as to whether [the defendant] purposefully discriminated against [the plaintiff] on the basis of race." *Id.*

In *Wallis v. J.R. Simplot Co.*, 26 F.3d 885 (CA9 1994), a Title VII and Age Discrimination in Employment Act case, the appellant relied on *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104 (CA9 1991), for the proposition that summary judgment for the employer is never appropriate where the plaintiff has established a *prima facie* case. *Wallis*, 26 F.3d at 889. The appellant argued that *Sischo-Nownejad*, which relied on *Lowe*, held that a plaintiff's *prima facie* showing is sufficient to defeat summary judgment.[44]

The *Wallis* court rejected the appellant's argument and affirmed summary judgment for the employer, holding that a plaintiff cannot defeat summary judgment by merely establishing a *prima facie* case. The court specifically held that, in response to the employer's offer of legitimate, non-discriminatory reasons for the adverse action, a plaintiff must produce " 'specific, substantial evidence of pretext' " to survive summary judgment. 26 F.3d at 890 (*citing Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (CA9 1983)). The court stated:

> [Plaintiff's] assertion, that once a plaintiff makes out a *prima facie* case summary judgment is impermissible, is untenable. His position would

44. Notably Judge Reinhardt, the author of the *Lowe* opinion, penned the *Sischo-Nownejad* decision as well.

> require a trial in every discrimination case, even where no genuine issue of material fact exists concerning the legitimacy of the employer's nondiscriminatory reasons. Such a result is not compelled by *Sischo-Nownejad* and would be contrary to other cases affirming summary judgment where the plaintiff failed to produce evidence of intentional discrimination.

Wallis, 26 F.3d at 890. The court held that *Sischo-Nownejad* actually stands for the proposition that when the Court ultimately determines whether the plaintiff has created an issue of fact regarding the credibility of the employer's stated non-discriminatory reasons for the adverse action, the court must look at *both* the evidence supporting the *prima facie* case and the evidence offered by the plaintiff to rebut the employer's stated reason as pretextual. *Wallis*, 26 F.3d at 890.

Other Ninth Circuit cases have explicitly held that a *prima facie* case, by itself, does not automatically create a triable issue of fact. *See Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 271 (CA9 1996) (upholding summary judgment for employer because plaintiff did not produce any evidence showing employer's stated reasons were pretextual); *Lindahl v. Air France*, 930 F.2d 1434, 1437 (CA9 1991) (holding "a plaintiff cannot defeat summary judgment simply by making out a *prima facie* case"); *DeHorney v. Bank of America Nat'l Trust & Sav. Ass'n*, 879 F.2d 459, 468 (CA9 1989) (upholding summary judgment for employer because plaintiff failed to establish nexus between alleged racial slur and decision to terminate); *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 804 (CA9 1987) (upholding summary judgment for employer because plaintiff "failed to produce sufficiently probative evidence of pretext"); *Cotton v. City of Alameda*, 812 F.2d 1245, 1250 (CA9 1987) (upholding summary judgment for employer because plaintiff

did not produce direct evidence that employer's stated reasons were pretextual); *Schuler v. Chronicle Broadcasting Co.*, 793 F.2d 1010, 1011 (CA9 1986) ("To withstand an employer's motion for summary judgment in a discrimination suit, the employee must do more that establish a prima facie case and deny the credibility of the employer's witnesses. [Cites omitted] The plaintiff must also offer specific and significantly probative evidence that the employer's alleged purpose is a pretext for discrimination.").

B. Petitioners Do Not Raise A Conflict Among The Circuits

The United States Courts of Appeals, including the Ninth Circuit, are in agreement that a plaintiff in an employment discrimination case cannot defeat summary judgment, once the employer has articulated a legitimate, non-discriminatory reason for the adverse employment action, merely by establishing a *prima facie* case. *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 834 (CA1 1993) (to survive summary judgment plaintiff must show evidence sufficient for fact finder reasonably to conclude discriminatory motive), *cert. denied*, 511 U.S. 1018 (1994); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 141 (CA2 1993) (plaintiff must show employer's stated reason is false and show real reason is discriminatory to establish pretext), *cert. denied*, 510 U.S. 1164 (1994); *Geary v. Visitation of the Blessed Virgin Mary*, 7 F.3d 324, 332 (CA3 1993) (plaintiff did not survive summary judgment because she did not present evidence showing genuine issue of fact as to employer's stated reason for discharge); *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1316 (CA4 1993) (defendant can obtain summary judgment by presenting evidence of legitimate, non-discriminatory reason about which plaintiff does not create factual dispute); *Davis v. Chevron U.S.A.*, 14 F.3d 1082, 1087 (CA5 1994) (plaintiff does not automatically defeat summary judgment by making out *prima facie* case but must also prove

pretext); *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314 (CA6 1989) (plaintiff established *prima facie* case but could not survive summary judgment because she did not introduce evidence that she was terminated because of her age); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124 (CA7 1994) (to survive summary judgment plaintiff must "produce evidence from which a rational factfinder could infer that the company lied" about its stated reasons); *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104, 1109 (CA8 1994) (to survive summary judgment plaintiff must produce evidence sufficient for reasonable fact finder to reject employer's stated reason), *cert. denied*, 513 U.S. 946 (1994); *Durham v. Xerox Corp.*, 18 F.3d 836, 840 (CA10 1994) (plaintiff could not survive summary judgment without proof of pretext or direct evidence of discriminatory intent), *cert. denied*, 513 U.S. 819 (1994); *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1287-88 (CA11 1997) (plaintiff could not survive summary judgment because she did not rebut employer's stated reason as pretextual).

C. Petitioners Do Not Raise A Conflict With This Court

Since Judge Reinhardt's opinions in *Lowe* and *Sischo-Nownejad*, this Court has addressed the issue of a plaintiff's burden of proof. In *St. Mary's Honor Center v. Hicks*, this Court granted certiorari where the Eighth Circuit reversed summary judgment for the employer on the grounds that once the plaintiff proved all of the employer's stated reasons were pretextual, the plaintiff was entitled to judgment as a matter of law. This Court reversed the Eighth Circuit and held that the plaintiff ultimately bears the burden of not only refuting the employer's stated reason as pretextual, but also establishing by a preponderance of the evidence that the employer intentionally discriminated against the plaintiff. 509 U.S. at 519. In so doing, this Court reaffirmed the analytical model developed under Title

VII. This Court stated that once the employer articulates a legitimate, non-discriminatory reason for the adverse employment action, the presumption of discrimination created by the plaintiff's establishment of a *prima facie* case "simply drops out of the picture." 509 U.S. at 510-11. It logically follows from *Hicks* therefore that, once the employer articulates a legitimate, non-discriminatory reason for the adverse employment action, the plaintiff cannot defeat summary judgment by relying on her *prima facie* case alone. *See also*, *Burdine*, 450 U.S. 248; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Petitioners have identified no conflict within the Ninth Circuit nor among the United States Courts of Appeals nor with this Court. Indeed, the issue presented by petitioners ignores an entire body of case law developed by this Court, as well as the lower courts in the federal and state judicial systems, establishing the analytical model of burdens of proof and production in employment discrimination cases. Accordingly, petitioners' first Question Presented fails to raise an issue warranting Supreme Court review.

II.

PETITIONERS' CONTRACT CLAIMS ARE PREEMPTED BY THE LMRA, THUS WHETHER OR NOT AN EMPLOYER'S HUMAN RESOURCES POLICIES MAY FORM THE BASIS OF AN IMPLIED CONTRACT IS IMMATERIAL.

Petitioners' second Question Presented is whether the appellate court erred by holding that, contrary to California law, an employer's Human Resources policies cannot form the basis of a valid employment contract where the employer reserves the right to unilaterally modify the terms of the

policies.[45] Petitioners, however, take one sentence of the appellate court's decision out of context and thereby have missed the point entirely. Petitioners are union members subject to a Collective Bargaining Agreement. The issue for the court below was *not* the general question of whether an implied contract may be based upon an employer's Human Resources policies. The specific question was whether a plaintiff can maintain a state-law cause of action for breach of contract and breach of the implied covenant of good faith and fair dealing where, as here, a collective bargaining agreement governed the employment relationship.

The appellate court's response to this question was correct. The appellate court held that petitioners' employment relationship with Lockheed is governed by a Collective Bargaining Agreement and petitioners' breach of contract and breach of the implied covenant claims are therefore preempted by the LMRA.[46] *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985) ("questions relating to what the parties to a labor agreement agreed . . . must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contact claims as tortious breach of contract."); *accord*, *Chmiel v. Beverly Wilshire Hotel Co.*, 873 F.2d 1283, 1285-1286 (CA9 1989) (claims for breach of implied contract and implied covenant are preempted under section 301); *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857 (CA9 1987), *cert. denied*,

---

45. Petition at 13.

46. Opinion at 6a, Appendix A to the Petition. Any additional comments made by the appellate court concerning petitioners' attempt to establish an implied in fact contract based on Lockheed's Human Resources policies are immaterial.

486 U.S. 1054 (1988) ("[t]he preemptive force of section 301 is so powerful as to displace entirely any state cause of action for violation of a collective bargaining agreement.") (*relying on Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 23 (1983)). As a matter of federal law, petitioners could not bring individual contract claims because they belong to a union which has a Collective Bargaining Agreement. Petitioners have cited no authority to the contrary.

Although petitioners do not dispute that their employment is governed by a Collective Bargaining Agreement, they argue that their contract claims are not preempted because their contracts are separate from the Collective Bargaining Agreement. However, no concurrent implied contract can exist where there is already an express contract — the Collective Bargaining Agreement — on the same subject. *Chmiel*, 873 F.2d at 1285-1286 (holding plaintiff's breach of contract claim based on express or implied agreement outside the collective bargaining agreement preempted because independent contract claim concerned job position governed by collective bargaining agreement); *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 1000 (CA9 1987) (holding implied covenant claim preempted because it is " 'inextricably intertwined with consideration of the terms of the labor contract' ").

This is consistent with other Supreme Court authority. When addressing disputes between employees and employers regarding the scope and breadth of collective bargaining agreements, this Court has enunciated general principles applicable here. In *Republic Steel Corporation v. Maddox*, 379 U.S. 650 (1965), this Court stated:

> A contrary rule which would permit an individual to completely sidestep available grievance procedures [under the collective bargaining

> agreement] in favor of a lawsuit has little to commend it. . . . [I]t would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances.

Maddox, 379 U.S. at 653. In *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), this Court provided:

> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. [Cites omitted] *The collective bargaining agreement covers the whole employment relationship.*

United Steelworkers, 363 U.S. at 578-79 (emphasis added). These general principles have guided lower courts in deciding that no concurrent implied contract can exist where there is already an express contract — a collective bargaining agreement — on the same subject.

Accordingly, the appellate court correctly ruled that petitioners' breach of contract and breach of the implied covenant claims are preempted by § 301 of the LMRA. Petitioners' misstatement of the appellate court's decision does not change that fact nor create an issue for this Court's review.

III.

THE ISSUE IS NOT WHETHER PETITIONER ANDERSON COMMENCED HIS ADMINISTRATIVE PROCEEDINGS BUT WHETHER HE EXHAUSTED THEM.

Petitioners' third and final Question Presented is whether the appellate court erred when it rejected petitioner Anderson's FEHA cause of action on the basis that his uncorroborated declaration was not sufficient to raise a genuine issue of fact regarding whether or not he had timely filed a charge of discrimination with the California Department of Fair Employment and Housing ("DFEH").[47] Once again, petitioners have failed to see the forest for the trees.

Under California law, to maintain a civil action for damages under the FEHA, a plaintiff must, as a precondition to the suit, exhaust the administrative remedies established thereunder. *See Commodore Home Systems, Inc. v. Superior Court*, 32 Cal. 3d 211, 213-14, 185 Cal. Rptr. 270, 271 (1982); *Denney v. Universal City Studios Inc.*, 10 Cal. App. 4th 1226, 1232, 13 Cal. Rptr. 2d 170, 173 (1992). To exhaust administrative remedies, a plaintiff must obtain a right to sue letter. *See Commodore*, 32 Cal. 3d at 213-14, 185 Cal. Rptr. at 271. A plaintiff who fails to exhaust administrative remedies *prior to* filing suit cannot maintain a civil action alleging violation of the FEHA. *See Miller v. United Airlines, Inc.*, 174 Cal. App. 3d 878, 890-91, 220 Cal. Rptr. 684, 691-92 (1985) (plaintiff failed to exhaust her administrative remedies where she obtained right to sue letter *after* filing suit). Failure to exhaust administrative remedies is a jurisdictional, not a procedural, defect. *Miller*, 174 Cal. App. 3d at 890, 220 Cal. Rptr. at 691. Therefore, if a plaintiff fails to do so, the trial court must grant summary judgment and dismiss the suit. *Id.*

---

47. Petition at 14-15.

It is undisputed that petitioner Anderson did not obtain a right to sue letter before filing the instant action.[48] Accordingly, petitioner Anderson did not exhaust his administrative remedies and his cause of action for discrimination on the basis of race in violation of the FEHA fails as a matter of law. *See Grywczynski v. Shasta Beverages, Inc.*, 606 F. Supp. 61, 65 (N.D. Cal. 1984) ("Compliance with the administrative procedures set forth in the statute is a prerequisite for any private civil suit for age discrimination under California law.").

Petitioner Anderson is quibbling about the immaterial issue of whether he *filed a charge* of discrimination with the DFEH. That issue is not dispositive. The first step in the administrative process under the FEHA is the timely filing of a charge of discrimination with the DFEH. *See Cal. Gov't Code* § 12960. The filing of this charge, commences administrative remedies; it does not exhaust them. The dispositive issue is whether petitioner Anderson received a right to sue letter. That letter is a jurisdictional prerequisite and it is undisputed that petitioner Anderson did not obtain one. Thus, the appellate court did not have to decide the issue petitioners present here. Because petitioners have raised an immaterial issue that had no affect on the ultimate outcome of the case, the petition for Supreme Court review should be denied. *See SS Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (dismissing writ of certiorari where question presented considered academic, stating "[w]hile this Court decides questions of public importance, it decides them in the context of meaningful litigation.").

---

48. Petitioner Anderson did attempt to save his claim by obtaining a right to sue letter after Lockheed had already moved for summary judgment. This belated attempt to comply with the requirements of *Cal. Gov't Code* § 12960 is ineffective. Because he did not exhaust his administrative remedies before filing suit, petitioner Anderson cannot maintain the instant action. *See Miller*, 174 Cal. App. 3d at 891, 220 Cal. Rptr. at 692.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

SCOTT B. KIDMAN
Counsel of Record
KIM Y. GOHATA
QUINN EMANUEL
URQUHART OLIVER &
HEDGES, LLP
Attorneys for Respondents
865 South Figueroa Street
10th Floor
Los Angeles, CA 90017-2543
(213) 624-7707